SUPREME COURT, U.S.
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CASE NO. 94-86

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RONALD BELL, FRANK AROSTEGUI, RICHARD MCLEAN, ROBERT THOMAS, ROBERT FAIR, JOHN HICKEY, KENNETH A. LEIBNITZER, GEORGE MEYER, EDWARD J. KING, ORLANDO PAREDES, AND ROBERT L. DAUGHERTY,

Petitioners,

v.

CITY OF MIAMI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Miami (City) files this brief in opposition to the petition for writ of certiorari brought by Ronald Bell and his co-petitioners (referenced collectively for convenience as "Mr. Bell"), to review *City of Miami v. Bell*, 634 So. 2d 163 (Fla.

1994). The City respectfully requests that the Court deny the petition to review that decision, here referenced as "*Bell*."

The petition presents no valid claim under the United States Constitution, as the *Bell* decision is based entirely on principles of state law which are independent and adequate grounds for the Court's decision. The lengthy history of this litigation throughout the workers' compensation courts and appellate tribunals of Florida included no assertion of a federal constitutional right until rehearing was filed with the Florida Supreme Court *after* publication of the *Bell* decision. Indeed, the *Bell* case had come to the Florida high court by way of questions certified from the First District Court of Appeal of Florida, with no hint of any federal issue by Mr. Bell before that appellate court or the preceding workers' compensation tribunal. If federal constitutional principles had any relevance to the *Bell* cases they would have arisen from the Florida Supreme Court's issuance of its decision in *Bell*, but the Court's decision was an unremarkable adherence to Florida law precedent on the retroactivity of prior Florida court decisions.

STATEMENT IN OPPOSITION TO JURISDICTION

Mr. Bell asserts that jurisdiction is invoked under 28 U.S.C. Section 1257, but any authority for invoking the Court's jurisdiction under that law is absent. The determination in these cases did not turn on the validity of a treaty or statute of the United States, or on title, right, privilege, or immunity specially set up or claimed under the Constitution, treaties or statutes of the United States. Nor did the determination of *Bell*

involve a state statute asserted to be repugnant to the Constitution.

Each decision rendered in the *Bell* line of cases was argued and decided solely on state law principles. Each case had been initiated as a claim filed in Florida's workers' compensation tribunal for workers' compensation benefits under Florida law. The cases continued in that narrow vein until the Florida Supreme Court issued its *Bell* decision. The federal constitutional issue, raised for the first time in Mr. Bell's request for rehearing of *Bell*, consists solely of petitioners' hollow allegation of a "due process deprivation."

STATEMENT OF THE CASE

Mr. Bell's Statement of the Case omits relevant information. He advises that the City continued to offset workers' compensation payments against disability pensions after the first *Gates* decision[1/] (about which more will be said in the argument portion of this brief), but he fails to advise the court that the City's offsets had been approved in an unbroken series of Florida appellate decisions dating from 1962 until those appellate decisions were overturned by the Florida Supreme Court in 1989 in *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989). *See, e.g., Hoffkins v. City of Miami*, 339 So. 2d 1145 (Fla. 3d DCA 1976); *City of Miami v. Knight*, 510 So. 2d 1069 (Fla. 1st DCA), *review denied*, 518 So. 2d 1276 (Fla. 1987); *City of Miami v. Graham*, 138 So. 2d 751 (Fla. 1962); *Giordano v. City of*

1/ *City of Miami v. Gates*, 393 So. 2d 586 (Fla. 3d DCA), *review denied*, 402 So. 2d 608 (Fla. 1981).

Miami, 526 So. 2d 737 (Fla. 1st DCA 1988), *rev'd*, 545 So. 2d 252 (1989); *City of Miami v. Barragan*, 517 So. 2d 99 (Fla. 1st DCA 1987), *rev'd*, 545 So. 2d 252 (Fla. 1989); *Thorpe v. City of Miami*, 356 So. 2d 913 (Fla. 3d DCA), *cert. denied*, 361 So. 2d 836 (Fla. 1978); *West v. City of Miami*, 341 So. 2d 999 (Fla. 3d DCA 1976), *cert. denied*, 355 So. 2d 518 (Fla. 1978); and *City of Miami v. West*, IRC Order 2-2647 (May 22, 1974), *cert. denied*, 310 So. 2d 304 (Fla. 1975).

The *Barragan* decision became final on July 14, 1989 when the Supreme Court denied the City's motion for rehearing. The City stopped offsetting the workers' compensation from the disability pension immediately, effective with the first, post-*Barragan* monthly disability pension checks issued on August 1, 1989. Mr. Bell's insinuation that the City continued offsets irresponsibly or illegally is not accurate.

Mr. Bell and the other petitioners in this case are former police officers, firefighters, and a sanitation worker who sustained injuries compensable under Florida's Workers' Compensation Act. As a result of the *Barragan* decision, Mr. Bell and others filed claims seeking a "restoration" of workers' compensation benefits, in the form of an after-the-fact recoupment of offset sums.

The *Gates* class action referenced in the petition concerned only internal accounts of the City with regard to the funding of the pension system. Mr. Bell attempts to meld the pension offset and *Gates* litigations. As more fully set forth in the argument section of this brief, those cases are separate, distinct, and independent from all pension offsets issues.

ARGUMENT

I. The decision not to apply *Barragan* retrospectively was properly decided on principles of state law.

Mr. Bell asserted his federal constitutional claim in the Florida Supreme Court, and asserts it here, based on language in the *Bell opinion* of the Florida Supreme Court. His quarrel with the words employed by that court is inappropriate. The court's *decision* is the only legitimate touchstone for evaluating whether any constitutional right was infringed. The *decision* in *Bell* was rendered on the narrow ground -- fully briefed and argued to the court by Mr. Bell and the City -- of state law principles governing the retroactivity of Florida appellate decisions. Mr. Bell's petition offers no insight to what the Florida Supreme Court *decided*, as opposed to picking at part of what it *said*.

The City had historically offset employees workers' compensation benefits by pension benefits paid to its employees, under state law. This practice was grounded in an ordinance enacted by the City in 1940, and repeatedly upheld by the state's appellate courts, reflected in two published decisions. *Hoffkins v. City of Miami*, 339 So. 2d 1145 (Fla. 3d DCA 1976); *City of Miami v. Knight*, 510 So. 2d 1069 (Fla. 1st DCA), *review denied*, 518 So. 2d 1276 (Fla. 1987). In 1989, the Florida Supreme Court held in *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989), that the City could not offset workers' compensation payments from pension benefits paid to the same employee. The *Barragan* decision did not say whether its "no offset" outcome was retrospective or only prospective.

The *Barragan* decision held that a repeal of the *state's* pension offsetting statute in 1973 -- section 440.09(4), Florida Statutes (1971) (which the City's ordinance mirrored) -- terminated the City's authority under its municipal ordinance to offset workers' compensation benefits from pension payments. The reasoning of the Court was grounded entirely in state law: that the state's workers' compensation law "preempted local regulation on the subject of workers' compensation." *Barragan*, 545 So. 2d at 254. When the *state's* offset authority was repealed, according to the *Barragan* decision, those sections of the statute which remained in effect operated to prohibit the deduction of benefits by the City's offset procedure. *Id.* Previously reported appellate decisions approving the City's offset ordinance were expressly disapproved. *Barragan*, 545 So. 2d at 255.

The *Bell* decision on review before the court answers the question of retroactivity left open in *Barragan* in 1989. *Bell* held that *Barragan* was *not* to be applied retroactively -- rebuffing the attempts of the *Bell* litigants to require that offset sums be paid to petitioners for the period prior to *Barragan*. The *Bell* decision addressed only the well-settled state jurisprudence regarding the retroactivity of Florida court decisions -- an issue briefed and orally argued to the Florida Supreme Court by all parties -- to determine that *Barragan* should not be applied retroactively. The *Bell* decision in no manner revisited the holding in *Barragan*, because that decision did not address the question of retroactive application. Mr.

Bell's contrary statement at page 12 of his petition is legally inaccurate.[2/]

The Florida Supreme Court's reliance on state decisions governing retroactivity was absolutely correct as a matter of state law. There was no link between that decision and any inherent "federal" question which would have mandated an application of *federal* standards for the retroactivity of judicial decisions. The determination of retroactivity would be a federal question only when the issue under consideration derives from federal law, whether constitutional or otherwise. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 2443, 115 L. Ed. 2d 481 (1991).

Since the 1989 *Barragan* decision was decided purely on the basis of the state's preemption of local government ordinances, and the 1994 *Bell* decision that *Barragan* was not retroactive was both presented and decided solely on *state* law principles, state law constitutes an independent and adequate basis for the *Bell* decision. Mr. Bell is not entitled to disturb that determination on review here. *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). *See also Sochor v. Florida*, ___ U.S. ___, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992) (failure to preserve alleged trial error constitutes independent and adequate ground for state supreme court not to consider federal claims).

2/ The Question Presented by Mr. Bell's petition also inaccurately insinuates that *Barragan* decided that Mr. Bell and his co-petitioners were entitled to be paid the sums offset. *Barragan* did not address the issue.

It bears emphasizing that the decisional law utilized by the Florida Supreme Court in determining not to apply *Barragan* retrospectively has been part of the state's jurisprudence for at least fifty years. *Florida Forest & Park Service v. Strickland*, 18 So. 2d 251 (Fla. 1944). The question of whether to apply *Barragan* retrospectively was presented throughout the proceedings in which Mr. Bell and the other petitioners sought to recoup, retroactively, their so-called pre-*Barragan* offset payments. The issue of retroactivity predominated when the Florida Supreme Court charted a course clearly contemplated by the questions certified for review by the First District to the Florida Supreme Court.

Mr. Bell and the other petitioners had every opportunity to assert Fifth and Fourteenth Amendment grounds against a holding that *Barragan* might be held to be prospective only -- procedurally a reversal of the First District decisions -- *prior* to the Florida Supreme Court's issuance of the *Bell* decision. No such federal claim was raised until rehearing, however, when these additional arguments against prospectivity were rejected. *Under Florida law*, that assertion came too late for consideration on the merits. *Sag Harbour Marine v. Fickett*, 484 So. 2d 1250 (Fla. 1st DCA 1985), *rev. denied*, 494 So. 2d 1150 (Fla. 1986); *Price Wise Buying Group v. Nuzum*, 343 So. 2d 115 (Fla. 1st DCA 1977).

Mr. Bell's failure to raise and preserve on appeal in state court the federal claim which he now asserts completely forecloses consideration of that federal claim in this certiorari proceeding. *See Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S.

537, 550, 107 S. Ct. 1940, 1948, 95 L. Ed. 2d 474, 487 (1987) (state court final judgment was not reviewable where alleged federal claim, raised for the first time in a motion for rehearing, was not properly presented to the state courts); *Webb v. Webb*, 451 U.S. 493, 496-97, 101 S. Ct. 1889, 1891-92, 68 L. Ed. 2d 392 (1981).

The only plausible issue for the Court -- although not articulated by Mr. Bell -- is whether the Florida high court took away Mr. Bell's federal constitutional rights with a "surprise" decision which could not have been anticipated. The court did not. The history of this litigation disproves any suggestion that the Florida Supreme Court's answer to the certified questions came as a surprise to Mr. Bell, in the form of some new or novel interpretation of state or federal law.[3/] The *Bell* decision wrought no change in the substantive law of retroactivity in Florida. Petitioners had full notice of the precedents utilized by the Florida Supreme Court in

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3/ This is categorically not a situation like that in *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902, 106 S. Ct. 3269, 91 L. Ed. 2d 1201 (1986), which involved 60 years of litigation resulting in the drastic decision of the Hawaii Supreme Court to overrule, on its own determination, Hawaii's established system of water rights law. In that case, there was no prior opportunity for landowners to demand just compensation for property rights in prior years once the court newly-declared an unprecedented territorial water rights system. When rehearing was sought by divested water owners, they got no discursive response on their newly-asserted due process and just compensation claims. In that unique circumstance, the Ninth Circuit found no inhibition to the federal court's enjoining the taking of landowners' property without appropriate condemnation proceedings.

reaching its decision -- all of which were state law precedents.

II. The issues of contractual rights and fiscal hardship to the City were not newly conceived by the Florida Supreme Court.

Mr. Bell contends, from *language* in the *Bell* decision, (i) that he was deprived of fair notice and hearing because the Florida Supreme Court premised its decision on a "contract" that was not in evidence, and (ii) that the court addressed fiscal hardship which he had no opportunity to rebut.[4/] Mr. Bell's assertions of surprise indicate a blind eye and deaf ear towards the very arguments driving the City's position since the onset of this litigation, both pre- and post-*Barragan*. *See City of Miami v. Burnett*, 596 So. 2d 478 (Fla. 1st DCA), *review denied*, 606 So. 2d 1164 (Fla. 1992) (since pension offset ordinance was invalid it could not be part of the law comprising the contract for benefits between the employer and employee); *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989) (pension offset provision invalid because it violated Section 440.21, Fla. Stat., pertaining to invalid "agreements");[5/] *City of Miami v. Barragan*, 517 So. 2d 99 (Fla. 1st DCA 1987) (question

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4/ Petition at 18-24. While there may not have been a labor agreement in the *Bell* record, petitioners neglected to mention that there were, at the very least, labor agreements in the *Thomas* and *McLean* records.

5/ In his dissenting opinion in *Barragan*, Justice McDonald concluded that the majority decision "negates an arms-length bargaining contract between the union representatives and the city . . . [and] implicitly invites the parties back to the bargaining table . . . " 545 So. 2d at 256.

certified as to whether "the employer's reduction of claimant's pension benefits, pursuant to contractual provision for offset of workers' compensation. . . . "); *City of Miami v. Knight*, 510 So. 2d 1069, 1073 (Fla. 1st DCA), *review denied*, 518 So. 2d 1276 (Fla. 1987) (pension ordinance "was part of Knight's pension and employment contracts with the City. . . ."); *see also City of Daytona Beach v. Amsel*, 585 So. 2d 1044 (Fla. 1st DCA 1991) (laws in force at time contract is made form a part of the contract).

Ironically, Mr. Bell's citation to the Florida Supreme Court's decision in *Florida Sheriffs Association v. Department of Administration, Division of Retirement*, 408 So. 2d 1033 (Fla. 1981), itself derails his view that the law of contracts has no relationship to a proper decision of the merits of this case. State-created property rights in earned retirement benefits are considered vested in Florida precisely because they are founded on "[a] contractual relationship [which] may not thereafter be affected or adversely altered by subsequent statutory enactments." *Florida Sheriffs Ass'n*, 408 So. 2d at 1036.

The City's pension offset ordinance constituted a contractual relationship which defined the breadth of Mr. Bell's property rights under the City's pension plan. *Bell's* short-hand conclusory comment in this regard was consistent with entrenched Florida law recognizing the "contractual" basis for pension and compensation plans. *E.g.*, *Sullivan v. Mayo*, 121 So. 2d 424 (Fla. 1960), *cert. denied*, 133 So. 2d 647 (Fla. 1961).

The determination of the nature of Mr. Bell's property right is quintessentially a state law question.

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). The *Bell* court's rejection of a retrospective impairment of *the City's* contract rights by subsequent judicial fiat was, as well, amply grounded in past Florida decisions. *See Bell*, 634 So. 2d at 166; *National Distrib. Co. v. Office of Comptroller*, 523 So. 2d 156 (Fla. 1988); *Florida Forest & Park Service v. Strickland*, 18 So. 2d 251 (Fla. 1944). And, as previously explained, *Bell's* decision not to apply *Barragan* retroactively was resolvable purely on state law principles.

Mr. Bell's assertion that he and other employees knew nothing about the City's fiscal hardship, until it was raised by the Florida Supreme Court in its opinion, is simply not a credible contention. The adverse, catastrophic effect on the City's budget of having to pay lump sum retroactive pension offset recoupments has been one of the key contentions of the City in all of the post-*Barragan* pension offset litigation. Ever since *Barragan*, the City has vigorously maintained that it would be inequitable to require it to pay lump sum retroactive pension offsets when there had been an unbroken string of numerous appellate decisions that upheld the validity of the City's pension offset ordinance.

There was no reason more singularly powerful to oppose retroactive application of *Barragan* than the financial hardship imposed on City taxpayers as a result of the unanticipated blow that the First District had given to the City's budget. This was argued at every turn, in each of the Florida appellate courts. In fact, the First District in *Bell* recognized that retrospective application would wreak havoc on the City's finances,

noting "[w]e can understand that the *Barragan* decision has generated something of a financial crisis for the City, and we are not entirely unsympathetic to the City's impassioned plea for relief." *City of Miami v. Bell*, 606 So. 2d 1183, 1185 (Fla. 1st DCA 1992), *rev'd*, 634 So. 2d 163 (Fla. 1994). Note that the First District itself reflected the City's contention regarding fiscal disarray! Mr. Bell's feigned cry of "surprise" at this third level of review cannot be viewed seriously, let alone elevated to a deprivation of due process.

III. The *Gates* litigation has no relevance to *Bell*.

The *Gates* litigation discussed in Mr. Bell's petition is legally irrelevant to this proceeding. It dealt exclusively with internal accounts of the City's budget, and had nothing whatever to do with the propriety of pension offsets. No federal constitutional issue is remotely implicated from the state court decisions which comprise the *Gates* series.

In a class action filed in state court in 1977, the *Gates* plaintiffs challenged the City's alleged improper diversion of *ad valorem* taxes that had been specially earmarked for pension purposes. Because those funds had been diverted to pay non-pension obligations to the City -- outstanding judgments and workers' compensation benefits -- the trial court entered summary judgment against the City. On appeal, the City argued that it did not matter that the funds were not used for the pension system because its employees were the ultimate recipients of both classes of payments. The appellate court rejected the City's contention. *City of Miami v. Gates*, 393 So. 2d 586, 588 (Fla. 3d DCA), *review denied*, 402 So. 2d 608 (Fla.

1981). It also expressly rejected the plaintiffs' contention that "the fiduciary status of the city . . . may be properly analogized to that of the trustee of an express trust. . . ." *Gates*, 393 So. 2d at 589, n.6.[6/]

The parties to the *Gates* litigation eventually reached a settlement, the City revamped its pension code in accordance with the terms of the settlement, and the trial court then entered a final judgment which enjoined plaintiff class members from bringing any claim arising from the application or interpretation of past or presently existing pension ordinances.

After *Barragan* was issued in 1989, the City sought to enforce the *Gates* final judgment as it pertained to class members who filed claims for retroactive pension offset benefits. Mr. Bell's counsel and other attorneys appeared in that proceeding on behalf of class members, and they adamantly maintained (contrary to the representations they now make to this Court[7/]) that the *Gates* litigation had nothing whatsoever to do with pension offsets. The appeal from the City's suit produced the appellate court's express recognition of "no basis on which to say that the class knew, or should have discovered . . . that the *Barragan* issue was involved in the class litigation. [footnote omitted]" *City of Miami v. Gates*, 592 So. 2d 749, 752 (Fla. 3d DCA 1992).

6/ Petitioners' statement (Petition at 6) that "the City" argued the "trust" theory is mistaken.

7/ Petition at p. 7.

CONCLUSION

Mr. Bell and the other petitioners have been deprived of no constitutional right. They have been denied the windfall of a retroactive, lump-sum payment of pre-*Barragan* pension offset sums which, prior to that 1989 decision, had been repeatedly held by the Florida courts to have been properly offset. Mr. Bell's dissatisfaction with the Florida Supreme Court's explanation of its decision in *Bell* provides no basis for the Court's jurisdiction or its exercise of discretion to accept the *Bell* decision for review.

Respectfully submitted,

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